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OAH 15-1902-19502-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Zachary Phillip
Nicholas, d/b/a Liberty Roofing and
Construction,
License No. 20579808

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

A prehearing conference was held before Administrative Law Judge Beverly Jones Heydinger ("ALJ") on April 25, 2008, at the Office of Administrative Hearings, 600 North Robert Street, Saint Paul, MN. The prehearing conference was held pursuant to a Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges, dated February 21, 2008.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry ("Department"). The Respondent, Zachary Phillip Nicholas, did not appear in person or by counsel. The hearing record closed upon the Respondent's default on April 25, 2008.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61 (2006)¹, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Steve Sviggum, ATTN: Nancy Leppink, Director of Legal Services, Minnesota, Department of Labor and Industry, 443 Lafayette Road, St. Paul, MN 55155, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under

¹ All statutory references are to the 2006 Minnesota Statutes.

Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this report becomes a final decision. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed.

STATEMENT OF ISSUES

1. By failing to obtain necessary local permits and inspections, did Respondent engage in a fraudulent, deceptive or dishonest practice, in violation of Minn. Stat. § 326.91, subd. 1 (2), and Minn. R. 2891.0040, subp. 1H (2007)?

2. By failing to satisfy the City of Anoka's correction orders, did the Respondent perform in breach of contract, in violation of Minn. Stat. § 326.91, subd. 1 (4)?

3. Did the Respondent demonstrate financial irresponsibility, in violation of Minn. Stat. § 326.91, subd. 1 (15)?²

4. Did the Respondent fail to respond to the Department's investigation, in violation of Minn. Stat. § 45.027, subd. 1a?

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On February 29, 2008, a copy of the Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause and Statement of Charges, was sent via first class to the Respondent at the address on file with the Department, as appears from the Affidavit of Service by First Class Mail.

2. On March 5, 2008, the ALJ sent information to the Respondent, restating the date of the prehearing conference. The letter was not returned to the Office of Administrative Hearings as not deliverable.

² The Statement of Charges mistakenly cited subdivision 1 (6) for this violation. Subdivision 1 (6) addresses the failure to correct a building code violation.

3. The Respondent failed to appear at the prehearing conference, did not obtain the ALJ's prior approval to be absent from the prehearing conference, did not file a Notice of Appearance, and did not request a continuance or any other relief.

4. The Notice of and Order for Hearing and Notice of Prehearing Conference contained the following informational warning:

Respondent's failure to appear at the prehearing conference may result in a finding that Respondent is in default, that the Department's allegations contained in the Statement of Charges may be accepted as true, and its proposed disciplinary action may be upheld.

5. Because Respondent failed to appear, he is in default.

6. Pursuant to Minnesota Rules, part 1400.6000, the allegations contained in the Notice of and Order for Hearing, Notice of Prehearing Conference, Order to Show Cause and Statement of Charges are taken as true and incorporated by reference into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against Respondent under Minn. Stat. §§ 326.91; 45.027, subd. 1; 45.024; and 14.50.

2. Respondent received due, proper and timely notice of the charges against him, and of the time and place of the prehearing conference. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

4. Under Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. On default, the allegations and the issues set out in the Notice of and Order for Hearing or other pleading may be taken as true or deemed proved without further evidence.

5. The Respondent is in default herein as a result of his failure, without the ALJ's prior consent, to appear at the prehearing conference.

6. By failing to satisfy the City of Brooklyn Park's correction notice for work performed at the home of Deborah and Dennis Spiess, and by failing to

obtain the necessary roofing permits for work performed in the City of Cambridge, the Respondent has engaged in a fraudulent, deceptive or dishonest practice, in violation of Minn. Stat. § 326.91, subd. 1 (2) and Minn. R. 2891.0040, subp. 1H.

7. By failing to satisfy the City of Anoka's correction orders, the Respondent has performed in breach of contract, in violation of Minn. Stat. § 326.91, subd. 1(4).

8. The Respondent issued a license fee renewal check to the Department which was returned for insufficient funds, and failed to issue a new valid check, and the Respondent issued a check to Isanti County for roofing permits that was returned for insufficient funds, and failed to make the necessary payments to Isanti County. By these actions, the Respondent has demonstrated financial irresponsibility, in violation of Minn. Stat. § 326.91, subd. 1 (15).

9. By failing to respond to the Department's request for information about the alleged violation in the City of Anoka, the Respondent has violated Minn. Stat. § 45.027, subd. 1a.

10. Disciplinary action against the Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED: that the Commissioner of the Department of Labor and Industry take adverse action against Respondent's license, censure Respondent, and/or impose a civil penalty upon Respondent.

Dated this 2nd day of May, 2008.

s/Beverly Jones Heydinger

s/Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Default (not recorded)